1998

State of Utah v. Blake D. Peterson : Brief of Appellee

Utah Court of Appeals

Margaret P. Lindsay; Aldrich, Nelson, Weight and Esplin; Counsel for Appellant.
Catherine M. Johnson; Assistant Attorney General; Jan Graham; Utah Attorney General; Claudia Laycock; Deputy Utah County Attorney; C. Kay Bryson; Utah County Attorney; Counsel for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 981675-CA**
vs.	:	
BLAKE D. PETERSON,	:	**Priority No. 2**
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTION FOLLOWING ENTRY OF CONDITIONAL GUILTY PLEA TO ONE COUNT OF POSSESSION OF A CONTROLLED SUBSTANCE IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, HONORABLE JUDGE RAY M. HARDING PRESIDING

CATHERINE M. JOHNSON (5975)
Assistant Attorney General
JAN GRAHAM (1231)
Utah Attorney General
160 East 300 South, 6th Floor
Salt Lake City, UT 84114-0180
(801) 366-0180

MARGARET P. LINDSAY (6766)
Aldrich, Nelson, Weight & Esplin
P.O. Box "L"
Provo, Utah 84603
(801) 373-4912

Counsel for Appellant

CLAUDIA LAYCOCK
Deputy Utah County Attorney
C. KAY BRYSON
Utah County Attorney
100 East Center Street, Suite 2100
Provo, Utah 84601
(801) 370-8026
Counsel for Appellee

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 981675-CA**
vs.	:	
BLAKE D. PETERSON,	:	**Priority No. 2**
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTION FOLLOWING ENTRY OF CONDITIONAL GUILTY PLEA TO ONE COUNT OF POSSESSION OF A CONTROLLED SUBSTANCE IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, HONORABLE JUDGE RAY M. HARDING PRESIDING

CATHERINE M. JOHNSON (5975)
Assistant Attorney General
JAN GRAHAM (1231)
Utah Attorney General
160 East 300 South, 6th Floor
Salt Lake City, UT 84114-0180
(801) 366-0180

MARGARET P. LINDSAY (6766)
Aldrich, Nelson, Weight & Esplin
P.O. Box "L"
Provo, Utah 84603
(801) 373-4912

Counsel for Appellant

CLAUDIA LAYCOCK
Deputy Utah County Attorney
C. KAY BRYSON
Utah County Attorney
100 East Center Street, Suite 2100
Provo, Utah 84601
(801) 370-8026
Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 981675-CA**
vs.	:	
BLAKE D. PETERSON,	:	**Priority No. 2**
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE CASE

Defendant appeals his conviction following entry of a conditional guilty plea to one count of possession of a controlled substance, a third-degree felony, in the Fourth Judicial District Court in and for Utah County, Utah, Honorable Judge Ray M. Harding presiding. This Court has jurisdiction of the case pursuant to Utah Code Ann. § 78-2a-3 (2) (1996).

ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. **Assuming officers seized defendant by driving up behind him on a narrow pull-out, did the trial court correctly hold that officers' actions were justified as an exercise of their community caretaker function, where the officers were investigating a report that an armed, suicidal person was in the area in a car that matched the general description of defendant's car?**

"We review the factual findings underlying a trial court's ruling on a motion to

suppress under a clearly erroneous standard. . . . We review the trial court's conclusions based on the totality of those facts for correctness." State v. Struhs, 940 P.2d 1225, 1226-27 (Utah App. 1997) (citation omitted).

2. Did the trial court correctly hold that officers had reasonable suspicion to detain defendant after defendant, who was seated in a parked car as officers drove up behind him, made furtive movements with his hand below the driver's seat, and then jumped out of the car, walked around the front of the car and threw a metallic object into the woods?

"This court has previously noted 'no analytical distinction among a trial court's determinations of when a seizure occurs, of reasonable suspicion, or of voluntary consent for purposes of the applicable standard of review.'" State v. Bean, 869 P.2d 984, 985 n.2 (Utah App. 1994) (quoting State v. Carter, 812 P.2d 460, 465 n.3 (Utah App. 1991), cert. denied 836 P.2d 1383 (Utah 1992)). "[W]hether a particular set of facts gives rise to reasonable suspicion is a question of law, which is reviewed for correctness. The legal standard for reasonable suspicion, however, 'is highly fact dependent and the fact patterns are quite variable.' The legal standard therefore conveys a measure of discretion to the trial court in our application of the correctness standard to a given set of facts." State v. Chapman, 921 P.2d 446, 450 (Utah 1996) (quoting State v. Pena, 869 P.2d 932, 939-40 (Utah 1994) (citations omitted)); see also State v. Hodson, 907 P.2d 1155, 1157 (Utah 1995).

CONTROLLING CONSTITUTIONAL PROVISION

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

Defendant was charged on May 10, 1996 with one count of possession of a controlled substance (methamphetamine), a third-degree felony under Utah Code Ann. § 58-37-8 (2)(a)(i) (Supp. 1998); one count of unlawful possession drug paraphernalia, a Class-B misdemeanor under Utah Code Ann. § 58-37a-5(1) (Supp. 1998); one count of having an open alcoholic beverage container in a motor vehicle, a Class-C misdemeanor under Utah Code Ann. § 41-6-44.20 (1998); and one count of littering, a Class-C misdemeanor under Utah Code Ann. § 41-6-115 (1998) (R. 3-4). A preliminary hearing was held September 20, 1996 (R. 147 at 1-28).

Defendant filed a Motion to Suppress evidence found by officers at the time of his arrest (R. 47-58). The trial court denied the motion on February 28, 1997 (R. 107-112).

Defendant entered a plea of guilty to one third-degree felony count of possession of a controlled substance, conditioned on retention of his right to appeal

the denial of his motion to suppress (R. 113-126). The State dismissed the remaining charges (R. 123). The trial court sentenced defendant to a suspended term of zero-to-five years in prison, and imposed 36 months of probation (R. 138-40).

Defendant filed a timely notice of appeal (R. 142).

STATEMENT OF FACTS

On April 19, 1996 at around 4 p.m., Utah County Sheriff's Deputies David Knowles and Harold Curtis received a dispatch call that an individual known to frequent the Squaw Peak area was suicidal and armed with a gun (R. 75, 147 at 4-5, 14). According to the message, the individual was driving a blue Ford Tempo (R. 75, 147 at 14). The deputies, in separate cars, set out to search for the individual (R. 147 at 5).

The deputies drove onto Archery Road (id.). As they came up to the first pull-out on the east side of the road, the deputies saw a blue passenger car through the trees which matched the description of the vehicle they were looking for (R. 73, 75, 147 at 5). Knowles radioed Curtis, who was directly behind him, and the two lawmen turned into the pull-out (R. 147 at 5-6). The pull-out was a narrow road that led to a small camping spot, and the blue car was parked in the middle of the road (R. 147 at 26). Knowles pulled up behind the blue car (R. 147 at 6). He did not activate his patrol car's overhead lights (id.). However, because of the narrow

road, his car blocked the blue car's only exit (R. 147 at 16).

As Knowles was pulling in behind the car, he saw defendant, in the driver's seat, making "furtive movements with his left hand. It looked as if he was doing something with his left hand at the bottom of his seat" (R. 147 at 6). As Knowles stopped his car, defendant got out, walked around the front of the car in a hurried manner, and threw a metallic object about 13 or 14 feet away into a wooded area (id., R. 75).

Deputy Curtis also saw defendant throw the object (R. 147 at 7). He got out of his patrol car and ordered defendant to place his hands on his head (id.). Defendant complied (id.). Curtis retrieved the metallic object from the woods (id.). It was a long, black pipe with marijuana in the bowl, still warm (id., R. 73).

At this point, the deputies were still uncertain whether they had located the vehicle they had been looking for (R. 147 at 10, 15). Knowles walked up to the blue car, and saw several other people inside (R. 147 at 7). Observing the car's occupants "acting suspicious, making furtive movements," Knowles told them to place their hands where he could see them (R. 147 at 10). When they did so, he saw an open Budweiser "Tall Boy" can on the floor of the back seat (R 75, 147 at 10, 18-19). Knowles ordered the occupants out of the car (R. 147 at 10, 18). When he reached in to pick up the open beer can, he smelled a strong odor of marijuana inside the car (R. 147 at 10).

Knowles searched the car and found, in the driver's door pocket, a package of Zig-Zag rolling papers and a piece of paper with a "rock" of methamphetamine rolled up inside it (R. 76, 147 at 11, 21). Defendant and his cohorts were placed under arrest (R. 76-78).

In his motion to suppress, defendant argued that the deputies unlawfully detained him without reasonable suspicion when they stopped behind his car on the pull-out (R. 47-58). He also claimed that the "stop" was not justified as a community caretaker stop (id.). The trial court denied the motion:

> The Court agrees that at some point, a level two stop of the Defendant occurred, and he was seized. The Court disagrees with the Defendant, however, as to when the stop occurred. . . . The Defendant clearly did not feel completely restrained by the mere presence of the deputy's vehicle behind him, since he got out and threw something into the woods. It was only after he had thrown the object that his freedom was restrained by the deputies.
>
> The Defendant's car was already stopped in the pull-out when the deputies approached and he was clearly free to move around, similar to the defendant in Jackson [1] . . . . The Defendant did not voluntarily approach the deputies and initiate the contact, but that is only because before he could do so, he threw the pipe into the woods, an act which created a reasonable suspicion in the deputies' minds of criminal activity.
>
> The furtive movements alone of the Defendant do not provide a reasonable suspicion of criminal activity. However, when viewed in the totality of the circumstances, the furtive movements coupled with the attempt to conceal the metallic object by throwing it into the woods does

---

[1]The trial court was referring to State v. Jackson, 805 P.2d 765 (Utah App. 1991), wherein this Court found that no seizure occurred when officer stopped his patrol car in front of the defendant's car, blocking its exit. Id. at 768. The Court noted that the officer did not block the car until after defendant had exited the car, and that the defendant voluntarily initiated a conversation with the officer. Id.

> create a reasonable, articulable suspicion of criminal activity authorizing the deputies to temporarily detain the Defendant while they investigated. Since these actions occurred prior to, or contemporaneously with Deputy Knowles blocking the exit to the pull-out with his vehicle, the Court finds that the subsequent seizure of the defendant was appropriate. Once the deputies had located the marijuana pipe in the woods, in addition to viewing the open containers of alcohol in the vehicle, they had reasonable suspicion sufficient to justify searching the car without a warrant.
>
> . . .
>
> The Deputies's [sic] original purpose in pulling in behind the Defendant's vehicle was to ascertain whether or not this was the vehicle possibly containing the suicidal individual.
>
> . . .
>
> The Court finds that Deputy's [sic] Knowles and Curtis were acting in a reasonable manner when they pulled in behind the Defendant's vehicle. It is ludicrous to expect the deputies to make a determination of whether or not this was the vehicle they were looking for without pulling off of the main road and inspecting the blue vehicle they had spotted from the road. Indeed, it would be unreasonable for them, suspecting someone's life was in imminent danger not to investigate. It is unclear from the record how specific the description of the vehicle they were looking for was, but it is evident to the Court that the Defendant's vehicle has enough similar characteristics to lead the deputies to pull in behind the Defendant's vehicle and investigate. . . . Therefore, the Court finds that the second prong of the [community caretaker] test was met and the Defendant was seized pursuant to a reasonable community caretaker stop.

(R. 108-11, reproduced in Addendum A).

SUMMARY OF ARGUMENT

The trial court found that a detention did not occur until after defendant threw the pipe into the woods, rejecting defendant's contention that the deputies seized him when they pulled up behind him. Importantly, defendant does not challenge the trial court's primary holding as to when the detention occurred. Instead, defendant attacks the trial

court's alternative holding that, even if a detention had occurred as the deputies pulled up, it was justified as an exercise of the officers' community caretaker function because the officers were investigating a report that an individual driving a car similar to defendant's vehicle was armed, suicidal, and in the area. Defendant maintains that no reasonable officer would have pulled in behind defendant's car because it was a Dodge and the suicidal individual was reportedly driving a Ford. However, the record shows that the officers were not able to determine the make of the car from the main road, and had to drive into the pull-out to investigate more closely. The deputies'actions were appropriate in accordance with their community caretaker responsibilities.

The officers' detention of defendant after he threw the pipe into the woods was supported by reasonable suspicion. As Deputy Knowles drove up, he saw defendant fumbling below the driver's seat with his left hand. As the deputy stopped, defendant left the car, walked around the front of the car and tossed the metallic object into the woods. The inevitable conclusion to be drawn from the totality of the circumstances was that defendant was attempting to conceal evidence of a crime from police. The seizure which occurred at that point was valid.

ARGUMENT

POINT I

THE DEPUTIES WERE JUSTIFIED IN PULLING UP BEHIND DEFENDANT'S PARKED VEHICLE BECAUSE, IN A PROPER EXERCISE OF THEIR COMMUNITY CARETAKER FUNCTION, THEY WERE ATTEMPTING TO PREVENT A SUICIDE

Defendant has not argued on appeal that the trial court erred in concluding that defendant was not seized under the Fourth Amendment until after he threw the marijuana pipe into the woods (R. 110).[2] Nor does defendant attack the trial court's finding that "defendant clearly did not feel completely restrained by the presence of the deputy's

---

[2]Failure to challenge a trial court's ruling on appeal establishes the court's ruling as the law of the case, precluding judicial review. State v. Rodriguez, 841 P.2d 1228, 1229 (Utah App. 1992) ("In general, if a defendant has not raised an issue on appeal, we may not consider the issue sua sponte").

However, even if defendant had contested the trial court's conclusion that no seizure occurred until after defendant threw the pipe into the woods, the trial court was correct as a matter of law. As the trial court correctly recognized, there is no seizure pursuant to a police show of authority unless the subject actually yields to the authority. In California v. Hodari, 499 U.S. 621, 626 (1991), the U.S. Supreme Court considered a case where a defendant fled from a pursuing officer on foot. The officer intercepted the defendant via an alternate route. The defendant saw the officer and tossed away a rock of crack cocaine just before the officer tackled him. The Court held that the trial court properly denied a motion to suppress the cocaine, ruling that even if the officer had engaged in a "show of authority" by chasing the defendant, the defendant did not yield to the "show of authority" by stopping. Id. at 629. No seizure occurred until the officer tackled the defendant. Id.

In this case, as in Hodari, defendant did not yield to the officers' alleged "show of authority." Instead of remaining in his seat or coming out to talk to the officers, as would be expected of someone whose freedom had truly been restrained, he hastily bailed out of the car in the direction opposite the officers to throw his pipe in the woods, thereby evading any encounter with the officers until he was ordered to place his hands on his head.

vehicle behind him since he got out and threw something into the woods" (id.). Instead, defendant challenges the trial court's alternative holding that even if a detention had occurred prior to that point, the officers were justified in pulling behind defendant's parked vehicle in the exercise of their community caretaker functions (R. 109-110).

A. The Trial Court Correctly Determined that the Officers Were Acting as Community Caretakers In Pulling Up Behind Defendant.

In Provo City v. Warden, 844 P.2d 360 (Utah App. 1992), aff'd 875 p.2d 557 (Utah 1994), this Court held that law enforcement officers are authorized to stop vehicles in the exercise of their community caretaking functions for purposes unrelated to penal or regulatory enforcement. In that case, the Court set forth a three-tiered test to be used in evaluating the legitimacy of a community caretaker stop:

> First, did a seizure occur under the Fourth Amendment definition of that term? Second, based upon an objective analysis, was the seizure in pursuit of a bona fide community caretaker function - under the given circumstances, would a reasonable officer have stopped a vehicle for a purpose consistent with community caretaker functions? Third, based upon an objective analysis, did the circumstances demonstrate an imminent danger to life or limb?

Id. at 364.

Below and on appeal, defendant admits that the first and third elements of the test are met. Appellant's Brief at 10. His only challenge is whether, under the second element, a reasonable officer would have stopped defendant's blue Dodge where the suicidal individual was reportedly in a blue Ford. Id. Defendant argues that at 4 o'clock

on an April afternoon, the officers should have been able to see that they had the wrong car. Id.

However, despite what the officers "should" have been able to see, the record is unequivocal that the officers were not able to determine from the main road whether defendant's car matched that of the suicide risk.[3] The evidence strongly supports the trial court's findings that the officers' sole purpose in pulling behind defendant's vehicle was to ascertain the make and model of the car, and that before Deputy Knowles "could pull close enough behind the vehicle to make that determination, the Defendant pulled something from underneath the sear, exited the vehicle and threw it into the woods" (R. 109). Deputy Knowles testified that when he first spotted defendant's car, he believed that it matched the description of the blue car the officers were searching for (R. 147 at 5). Both officers' written reports of the incident indicated that defendant's car was the same color as the one they were seeking (R. 73, 75). Furthermore, Deputy Curtis's report stated that the officers viewed defendant's car "through the trees," indicating that their viewpoint was somewhat obstructed (R. 73). Knowles testified that even after pulling into the pullout and observing defendant fling the metallic object into the bushes, the officers still had not verified whether they had located the car they were originally

---

[3]Although defendant asserts that the dispatch report concerned a suicidal individual, and that the officers "must have been close enough to realize" that the car contained more that one person, the record nowhere indicates that the officers were able to determine from the main road the number of people in the car. Appellant's Brief at 7-8.

looking for (R. 147 at 10). On cross-examination, the officer stated that when he received the dispatch report about the suicidal individual, "I don't think I wrote it down. I believe I just made a mental note that it was a blue vehicle" (R. 147 at 13). And, although he stated at the hearing that he is now "much better at [distinguishing a Ford from a Dodge] than I was," Knowles did not testify that he was able to determine the make of defendant's car without getting close to it (R. 147 at 15).

In short, it is clear from the record that the officers were not able at first glance to eliminate defendant's car as belonging to the individual reported to be suicidal. In order to confirm or disprove that the blue car they saw through the trees contained the armed and suicidal person they sought, the officers were required to come closer to investigate. Under the circumstances, in order to deter a suicide, a reasonable officer would be expected to do no less. Provo City v. Warden, 844 P.2d at 365 ("prevention of a suicide is consistent with an officer's community caretaker function"). Indeed, as the trial court found, the officers would have been seriously derelict in performance of their duties if, knowing that a life was in danger, they had driven away simply because they could not determine the car's make through the trees (R. 109). The officers engaged in a valid exercise of their community caretaking function in driving up to defendant's car.

POINT II

THE TRIAL COURT PROPERLY CONCLUDED THAT DEFENDANT'S FURTIVE MOVEMENTS, COUPLED WITH HIS THROWING THE MARIJUANA PIPE INTO THE WOODS, PROVIDED OFFICERS WITH REASONABLE SUSPICION TO DETAIN HIM

Defendant claims that the trial court erred in finding that defendant's furtive movements, together with his actions in throwing the pipe into the woods, were insufficient to give rise to reasonable suspicion to detain him. Although defendant's furtive movements alone may have been insufficient to create reasonable suspicion, those actions coupled with defendant's hasty and overt act of throwing the pipe into the woods gave rise to the reasonable (in fact, inescapable) suspicion that defendant was trying to conceal evidence of a crime from police. Under the totality of the circumstances, the officers were justified in detaining defendant.

Utah's appellate courts recognize three levels of police-citizen encounters:

> (1) An officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense had been committed or is being committed.

State v. Johnson, 805 P.2d 761, 763 (Utah 1991) (citations omitted).

The determination of articulable suspicion is fact intensive. See State v. Struhs, 940 P.2d 1225, 1228 (Utah App. 1997). The test "'consider[s] the totality of the

circumstances to determine whether the officer had "specific and articulable facts" to support suspicion.'" State v. Strickling, 844 P.2d 979, 982 (Utah App. 1992) (quoting State v. Munsen, 821 P.2d 13,15 (Utah App. 1991) (quoting Terry v. Ohio, 342 U.S. 1, 21 (1968)). "'The level of suspicion required for a Terry stop is obviously less demanding than that for probable cause.'" Strickling, 844 P.2d at 982 (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).

The evidence is clear that upon seeing the officers pull up, defendant immediately left his car, walked around the front of the car -- away from the officers -- and threw a black metallic object into the bushes. As he drove up, Deputy Knowles observed defendant "doing something with his left hand at the bottom of his seat" (R. 147 at 6). As the deputy stopped his car, defendant left his car, walked around the front and threw the pipe into the woods (id.). Deputy Curtis's incident report indicates that "[w]e were pulling in to the pull out, and I saw [defendant] throw a black and metallic object in to the bushes to the south of the car" (R. 73). Since defendant's fumbling below his seat and hasty exit from his vehicle to throw the object into the woods were obviously a response to the arrival of the officers, the totality of the circumstances created a reasonable, articulable suspicion that the metallic object defendant threw into the woods was a weapon or other instrumentality of criminal activity. And, since the officers were looking for an armed individual and could reasonably have believed that the object thrown was a weapon, their ordering defendant to place his hands on his head was a justifiable

precaution to ensure the officers' own safety while they investigated, in the event that defendant possessed other weapons. See. State v. Chapman, 921 P.2d 446, 453 (Utah 1995) (where officer received report that defendant was known to carry a gun and ordered defendant to exit car and place his hands on his head, he was entitled to follow "ordinary safety procedures" to protect himself, including ordering defendant out of car; no improper detention occurred until after officers determined that defendant was unarmed).

The record therefore clearly supports the trial court's conclusion that "when viewed in the totality of the circumstances, the furtive movements coupled with the attempt to conceal the metallic object by throwing it into the woods does create a reasonable, articulable suspicion of criminal activity . . . . Since these actions occurred prior to, or contemporaneously with Deputy Knowles blocking the exit to the pull-out with his vehicle, the court finds that the subsequent seizure of the Defendant was appropriate" (R. 110). Cf. State v. Hodson, 886 P.2d 556, 560 (Utah App. 1993) (while furtive gesture alone insufficient to establish probable cause, "'deliberately furtive actions and flight at the approach of . . . law officers are strong indicia of mens rea'" . . . . (citation omitted) "'. . . suspicious movements, which occurred immediately after the detectives revealed their identity as police officers, gave rise to a reasonable inference that defendant did, in fact possess drugs . . .'" (citation omitted)), rev'd on other grounds, 907 P.2d 1155 (Utah 1995).

Defendant implies that because his furtive movements and throwing of the object

into the woods may also have been consistent with innocent activity, the officers lacked reasonable suspicion to detain him after observing those activities.[4] Appellant's Brief at 8. However, even if his actions were consistent with innocence, they were nevertheless strongly indicative of criminal conduct. Provo City Corp. v. Spotts, 861 P.2d 437, 440 (Utah App. 1993) ("where a defendant's conduct is 'conceivably consistent with innocent . . . activity,' but is also 'strongly indicative' of criminal activity, we will not hesitate to conclude that reasonable suspicion exists" (citation omitted)); see also State v. Chapman, 841 P.2d 725, 727 (Utah App. 1993), rev. in part on other grounds, 921 P.2d 446 (Utah 1995). Thus, reasonable suspicion existed to support his detention.

---

[4]The State does not agree that defendant's actions were consistent with innocent activity because even if defendant had been simply tossing an innocuous metallic object into the woods, he would still have been, at minimum, littering in front of the officers. In so doing, defendant subjected himself to arrest or detention. It is a crime for any person to "throw, deposit, or discard, or to permit to be dropped, thrown, deposited, or discarded upon any . . . public or private land . . . any glass bottle, glass, nails, tacks, wire, cans, barbed wire, boards, trash or garbage, paper or paper products, or any other substance which would or could mar or impair the scenic aspect or beauty of the land . . . ." Utah Code Ann. § 41-1-114 (Supp. 1998).

Under Utah Code Ann. § 77-7-15 (1995), "[a] peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense. . . ." In addition, "[a] peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person . . . for any public offense committed or attempted in the presence of any peace officer ." Utah Code Ann. § 77-7-2(1) (1995).

The record in this case is uncontroverted that the officers were present when defendant threw the marijuana pipe into the woods (R. 73, 75, 147 at 6-8, 16-17). His actions fell under the statutory definition of littering, a crime with which he was ultimately charged (R. 3). Therefore, the officers were authorized to detain or arrest him.

CONCLUSION

This Court should affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 23rd day of June, 1999.

JAN GRAHAM
ATTORNEY GENERAL

Catherine M. Johnson
CATHERINE M. JOHNSON
ASSISTANT ATTORNEY GENERAL

MAILING CERTIFICATE

I hereby certify that on this 23rd day of June, 1999, I mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to Margaret P. Lindsay, Aldrich, Nelson, Weight & Esplin, 43 East 200 North, P.O. Box "L," Provo, Utah 84603.

Catherine M. Johnson

Addendum A

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. BLAKE PETERSON, Defendant.	**MEMORANDUM DECISION AND ORDER** CASE NO. 961400720 DATE: February 28, 1997 JUDGE: RAY M. HARDING LAW CLERK: Christine Gerhart DEPUTY CLERK: Georgia Snyder

This matter came before the Court upon Defendant's Motion to Suppress. Having received and considered the Motion, together with memoranda in support of and opposition to the Motion, the Court hereby denies the Motion and delivers the following Memorandum Decision.

Statement of Facts

On April 19, 1996, at approximately 4:00pm, Deputies Harold Curtis and David Knowles of the Utah County Sheriff's Office received a report of a suicidal person, possibly armed with a gun, driving a blue Ford Tempo who may be in the Squaw Peak area. As Deputies Curtis and Knowles drove up Archery Road looking for the vehicle, they spotted a blue vehicle parked in a pullout off of the road.

Deputy Knowles turned into the pullout, to ascertain whether or not this was the vehicle they were looking for. As he pulled up behind the blue car, he saw the Defendant get out of the car and throw a shiny, metallic object into the woods. Deputy Curtis, pulling in behind Deputy Knowles also saw the occupant of the car throw the object, then saw the other

occupants begin to exit the car. He ordered them back into the vehicle, then approached the vehicle and asked the Defendant what he had thrown into the woods. The Defendant denied throwing anything, so Deputy Curtis went to search in the area he had seen the object thrown while Deputy Knowles approached the car to secure the rest of the occupants while the Deputies were conducting their investigation.

Deputy Knowles observed an open container of beer in the car and ordered the occupants out of the car. As he was retrieving the open container of beer, he noticed the smell of marijuana inside the car. Deputy Knowles searched the car and found methamphetamine folded inside a "Camel Buck" along with zig zag papers inside the driver's side door pocket. Deputy Curtis located a marijuana pipe from the area where he saw the Defendant throw the object. The pipe was still warm, was not wet or covered with dirt, and had marijuana residue inside the bowl.

Opinion of the Court

I. THE DEPUTIES HAD A REASONABLE, ARTICULABLE SUSPICION TO EXECUTE A LEVEL TWO STOP AND TEMPORARILY DETAIN THE DEFENDANT.

The Defendant argues that when Deputy Knowles pulled in and blocked the exit with his vehicle that at that point the Defendant was seized and entitled to Fourth Amendment protections. The Defendant relies on State v. Smith 781 P.2d 879 (Utah App. 1989) to claim that a level two stop occurred without a reasonable, articulable suspicion of criminal activity and that the facts in this case are entirely distinguishable from those in State v. Jackson 805 P.2d 765 (Utah App. 1990), where the court found a seizure had not occurred.

The Court agrees that at some point, a level two stop of the Defendant occurred and he was seized. The Court disagrees with the Defendant, however, as to when the stop occurred. The facts in this case seem to fall somewhere in between Smith and Jackson. Deputy Knowles testified that as he was pulling in behind the Defendant's vehicle, stopping

his vehicle and calling in the stop, he saw the Defendant reach underneath his seat, exit the car and throw a metallic object into the woods. (Preliminary Hearing Transcript, hereinafter "PHT" 16). He did not initiate the stop, as the officer in Smith did; however, the Defendant did not approach Deputy Knowles and initiate the contact as the defendant in Jackson did. The Defendant clearly did not feel completely restrained by the mere presence of the deputy's vehicle behind him, since he got out and threw something into the woods. It was only after he had thrown the object that his freedom was restrained by the deputies.

The Defendant's car was already stopped in the pull-out when the deputies approached and he was clearly free to move around, similar to the defendant in Jackson, *Id.* at 768. The Defendant did not voluntarily approach the deputies and initiate the contact, but that is only because before he could do so, he threw the pipe into the woods, an act which created a reasonable suspicion in the deputies' minds of criminal activity.

The furtive movements alone of the Defendant do not provide a reasonable suspicion of criminal activity. However, when viewed in the totality of the circumstances, the furtive movements coupled with the attempt to conceal the metallic object by throwing it into the woods does create a reasonable, articulable suspicion of criminal activity authorizing the deputies to temporarily detain the Defendant while they investigated. Since these actions occurred prior to, or contemporaneously with Deputy Knowles blocking the exit to the pull-out with his vehicle, the Court finds that the subsequent seizure of the Defendant was appropriate. Once the deputies had located the marijuana pipe in the woods, in addition to viewing the open containers of alcohol in the vehicle, they had reasonable suspicion sufficient to justify searching the car without a warrant.

II. THE STOP IS JUSTIFIED IN THE ALTERNATIVE AS A COMMUNITY CARETAKER STOP.

The Deputies's original purpose in pulling in behind the Defendant's vehicle was to ascertain whether or not this was the vehicle possibly containing the suicidal individual. From the roadway, Deputy Knowles saw the vehicle in the pullout was a blue sedan. He pulled into the pull-out, behind the Defendant's car to investigate whether or not this was, in fact, the blue Ford Tempo he was looking for.

The Defendant does not take issue with the first and third factors of the community caretaker stop test as defined in Provo City v. Warden, 844 P.2d 360, 364 (Utah App. 1992). However, the Defendant claims that the second factor, whether the police conduct was bona fide community caretaker activity, has not been met. The Defendant bases his argument on the fact that the car the deputies were looking for was a blue Ford Tempo, whereas his car is a blue Dodge.

The Court finds the Defendant's argument unpersuasive. The area the deputies were searching is heavily wooded and the Defendant's car was parked off of the main road on a side road or "pull-out" which leads to a camping spot. Deputy Knowles testified that from the main road all that he could see was that a blue passenger car was parked in the pull-out. Because of the physical circumstances, he was not able to ascertain whether the car was a Ford Tempo or not. His sole purpose in pulling in behind the Defendant's vehicle was to determine the make and model of the car to see if it matched his description. Before he could pull close enough behind the vehicle to make that determination, the Defendant pulled something from underneath the seat, exited the vehicle and threw it into the woods.

The Court finds that Deputy's Knowles and Curtis were acting in a reasonable manner when they pulled in behind the Defendant's vehicle. It is ludicrous to expect the deputies to make a determination of whether or not this was the vehicle they were looking for without pulling off of the main road and inspecting the blue vehicle they had spotted from the road. Indeed, it would be unreasonable for them, suspecting that someone's life was in imminent danger not to investigate. It is unclear from the record how specific the description

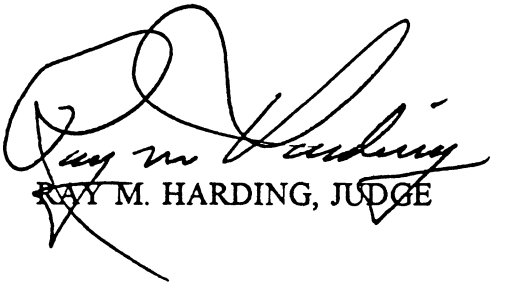
of the vehicle they were looking for was, but it is evident to the Court that the Defendant's vehicle has enough similar characteristics to lead the deputies to pull in behind the Defendant's vehicle and investigate. Indeed the Court finds that the deputies, as the officer in Warden were not acting within their duties of "detection, investigation, or acquisition of evidence relating to the commission of crimes" when they observed the suspicious activities of the Defendant. *Id.* at 365. Therefore, the Court finds that the second prong of the test was met and the Defendant was seized pursuant to a reasonable community caretaker stop.

Order

The Defendant's motion is denied.

DATED this 3rd day of March, 1997.

BY THE COURT:



RAY M. HARDING, JUDGE

cc: Utah County Attorney
Utah County Public Defender